IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 15TH MARCH 2007 / 24TH PHALGUNA 1928

Ins.APP.No. 41 of 2003()

IC.29/1999 of E.I.COURT, KOLLAM
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APPELLANT/OPPO.PARTY.

THE REGIONAL DIRECTOR,
E.S.I.CORPORATION, THRISSUR.

BY ADV. SRI.T.V.AJAYAKUMAR

RESPONDENTS: RESPONDENT.

M/S.SEEMATTI STORES,
CHALAI, TRIVANDRUM.

BY ADV. SRI.GOPAKUMAR R.THALIYAL
SRI.N.P.PRAJEESH

THIS INSURANCE APPEALS HAVING BEEN FINALLY HEARD ON 15/03/2007, THE COURT ON THE SAME DAY DELIVERED THE THE FOLLOWING:

K. PADMANABHAN NAIR, J.

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INS. APPEAL NO. 41 OF 2003

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Dated this the 15th day of March, 2007

J U D G M E N T

The Regional Director, E.S.I. Corporation, Thrissur, respondent in I.C. No. 29 of 1999, is the appellant. The appeal is filed against the order passed by the Employees' Insurance Court setting aside the order passed by the appellant under Section 85B of the Act by which the appellant was ordered to pay damages to the tune of Rs.14,835/-. Respondent herein is a firm covered by the provisions of the Act which is liable to pay contribution. The company did not pay contribution for the period from 10/96 to 3/98. The appellant made a demand and subsequently, the respondent paid the amount. Appellant issued a notice under Section 85B of the Act asking the respondent to show cause why an amount of Rs.14,835/- should not be imposed as penalty. No reply was seen filed. Subsequently, the appellant passed Exhibit B3 order demanding a sum of Rs.14,835/- as damages. Challenging that order, the respondent filed I.C. No.29 of 1999. The Insurance Court found that though there is delay in effecting

payment, delay in making payment is not failure on the part of the respondent and hence the establishment is not liable to pay the damages. Accordingly, the Insurance Court set aside Exhibit B3 order. Challenging that order, this appeal is filed.

2. Section 39(4) of the Employees' State Insurance Act imposes a liability on the part of the establishment to pay contribution. Regulation 31 of the E.S.I. (General) Regulations, 1950 provides that an employer is liable to pay contribution in respect of an employee within 21 days of the last day of the calender month in which the contribution falls due. Regulation 31C of the Regulations provides that an employer who fails to pay contribution within the prescribed time is liable to pay damages. So the finding of the Insurance Court that delayed payment is not failure to pay contribution is illegal and liable to be set aside. But that alone is not a ground to award damages. Section 85B of the Act provides that when an employer fails to pay contribution, the Corporation may recover the amount from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the Regulations. Learned counsel for the

respondent has argued that though Section 85B confers powers on the Corporation to recover damages, the same can be recovered only if there is contumacious conduct on the part of the employer in not remitting the contribution within the time. Counsel place reliance on the decision reported in **Regional Director, E.S.I. Corporation v. Metropolitan Engineering Co. Ltd., Kerala** (2001 (10 SCC 730) in which it was held that the authority shall take into account the financial constrains and sickness of the company.

3. Learned counsel for the appellant submitted that after the amendment of Section 85B of the Act in the year 1989 and also Regulation 31C of the Regulations with effect from 1.1.1992 no discretion is given regarding the claim for damages. It is submitted that Regulation 31C provides that if the contribution is not paid in time, the employer shall be liable to pay damages at the rate of 5% upto 2 months, at the rate of 10% for 2 months and above but less than 4 months, at the rate of 15% for 4 months and above but less than 6 months and at the rate of 25% for 6 months and above.

4. It is open to both sides to raise all contentions before the competent authority and the competent authority shall consider all the above stated aspects while passing a fresh order. In view of the contention of the respondent that they were not given an opportunity to raise their objections, it is only just and proper to direct the Regional Director to consider the issue afresh and pass orders in accordance with law.

In the result, the appeal is allowed. The order passed by the Employees' Insurance Court in I.C. No.29 of 1999 is hereby set aside. Exhibit B3 order dated 5.5.1999 passed by the appellant is also set aside. The respondent will be given an opportunity to file objection and adduce evidence, if any. Thereafter, the appellant shall pass fresh orders in accordance with law.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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M.F.A. NO. OF

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J U D G M E N T

15TH MARCH, 2007